Supreme Court, U.S.
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No. 86-130

In The

Supreme Court of the United States

October Term, 1986

VICKIE LORENE ROCK,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. REFUSAL TO ALLOW PETITIONER'S TESTIMONY WAS NOT HARMLESS ERROR

Respondent has argued that the trial court's restriction on the testimony of petitioner was harmless error. One has only to read the transcript of petitioner's testimony omitting the portions which were out of the hearing of the jury to understand that the error could in no way be considered harmless. The testimony was effectively reduced to a series of simplistic responses to questions paraphrased from the neuropsychologist's notes (JA 19, JA 96, 97-JA 105).

Much of what the State argues (and the Arkansas Supreme Court held the jury was able to hear about the event) was in fact statements by other persons about the event. For example, on page 15 of its brief, the State of Arkansas argues that petitioner "was able to 'remember' that she cocked the pistol." That is a misstatement of the testimony. A careful reading of the series of questions asked to Dr. Back preceding the referenced citation by the State to Joint Appendix 95 indicates that Dr. Back was simply saying yes, she remembered having asked the question whether the hammer was cocked, and no testimony whatever as to what petitioner's response was is included in the record.

Petitioner was unable to testify where she was standing when the gun went off (JA 103), that she had reached for the door and tried to leave but Frank "jumped in front of her" (JA 104), that Frank Rock had grabbed the gun and it discharged (JA 104), that petitioner had pointed the gun at the floor after she picked it up (JA 29), that

petitioner pleaded with her husband not to hit her again (JA 29), and that petitioner immediately called for help for her husband after the gun discharged (JA 29). Had the jury been able to hear and had they believed any substantial part of the testimony they could have concluded that the discharge of the firearm was completely accidental.

II. PETITIONER'S ARGUMENT THAT THE PRETRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL IS NOT A MOOT ARGUMENT AND WAS PREVIOUSLY RAISED.

Respondent has argued that petitioner did not raise the argument of impairment of right to effective counsel before the Arkansas Supreme Court, and that in any event, the issue is moot.

The first time the right to counsel argument was made appears in petitioner's written brief to the trial court citing *Cornell v. Superior Court*, 52 Cal. 2d 99, 338 P. 2d 447 (1959). (TR 33) The trial court clearly intended that there was an interruption in the relationship because on October 1, 1984, the trial court enjoined petitioner and her counsel from making any further use of hypnosis. (TR 59) That injunction was never lifted and so the issue is not moot.

Petitioner concedes that there is a substantial question as to whether the issue was raised or argued clearly on appeal to the Arkansas Supreme Court, but even if it was not, the Arkansas Supreme Court raised the issue again by going far beyond simply upholding the trial court in its order and in using the decision to adopt for the State of Arkansas the per se exclusionary rule where the witness

has been hypnotized. While a simple affirmance of the trial court's order in this case would have been dispositive of the issues, the Arkansas Supreme Court elected to go substantially further than the trial court and by so doing has certainly raised a constitutional issue as argued by petitioner.

III. PETITIONER IS NOT BARRED BY THE CONTEMPORANEOUS OBJECTION RULE FROM ARGUING THAT THE PRETRIAL COURT ORDER OF THE COURT WAS ARBITRARY AND UNREASONABLE IN NOT ALLOWING REFERENCE TO OTHER PREHYPNOSIS STATEMENTS.

Respondent has argued that petitioner did not comply with Arkansas's "contemporaneous objection rule" and is thereby not free to argue the arbitrariness of the order or of the refusal to admit other admittedly prehypnotic statements.

The proffer of the prehypnosis statements clearly was made for the purpose of showing additional prehypnosis memory on the part of petitioner. Both counsel for petitioner in its brief and the Arkansas Supreme Court in its opinion understood the purpose of the proffer but got sidetracked on a discussion of Rule 801 (d), Arkansas Uniform Rules of Evidence. Petitioner offered the exhibit. The State objected to the exhibit on the grounds that "its hearsay, irrelevant and everything else, Your Honor." (JA 105) The objection was sustained. The burden is on the objecting party to make known his specific ground for objection and the court was free to add any other further statement characterizing the evidence and the ruling thereon. Rule 103, Arkansas Uniform Rules of Evidence.

Because the transcript of the pretrial hearing is not included in the record it is impossible to determine on what basis the trial judge thought that the intake notes of the neuropsychologist were the "best evidence" of petitioner's prehypnosis memory. (JA 17) However from the context it is clear that the judge was not making a mistaken reference to the best evidence rule. The Arkansas Supreme Court noted that "once it has been shown by clear and convincing evidence that testimony of prehypnotic recollections is reliable, a subject may testify, but only to those memories *demonstrably* shown to be the product of the memory prior to the hypnosis. The burden of proving the reliability is on the preponent of the testimony." (emphasis added) (Appendix to Petition, p. x) Certainly there can be no more reliable statement in the context of it being a prehypnotic memory than a statement given to law enforcement officials months prior to the hypnosis. The Arkansas Supreme Court seems to say that it has to be proved what was remembered before the hypnosis but that prehypnosis statements made to law enforcement officials or presumably anyone else other than the hypnotist cannot be used to do it. That is unconstitutionally arbitrary and unreasonable. The issue was argued at the Arkansas Supreme Court at Pages 144 and 145 of petitioner's brief and at Page 4 of petitioner's reply brief.

IV. PETITIONER IS NOT BARRED FROM HER ARGUMENT THAT THE APPLICATION OF THE PRETRIAL ORDER AT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW BECAUSE OF THE ARKANSAS CONTEMPORANEOUS OBJECTION REQUIREMENT.

Respondent misconstrued petitioner's final argument that the pretrial order was improperly applied during the

course of the trial to an argument that the prosecution's numerous objections violated petitioner's right to testify. Respondent argues that such objection was not made at trial or argued on appeal. That issue stated by respondent is not the issue raised or argued by petitioner.

The process of increasingly restrictive rulings from the bench was objected to repeatedly at trial. JA 15, JA 19, JA 20, JA 21, JA 38, JA 39, JA 103, JA 104, JA 105) The argument was made in petitioner's brief to the Arkansas Supreme Court Pages 144 and 145 and was dealt with by the Arkansas Supreme Court. Specifically the Court stated "We turn to appellant's argument that the trial court's limitations on her testimony were too restrictive." (Appendix to Petition, p. ix) The Court further stated "Appellant argues the court misapplied the rule employed by courts where hypnotically induced testimony is inadmissible and was too restrictive." (Appendix to Petition, p. x)

Most importantly, however broad petitioner's constitutional argument may have been at the Arkansas Supreme Court, the Arkansas Supreme Court's decision with respect to the constitutional issues was equally broad. The Arkansas Supreme Court chose to discuss the constitutional rights only in general without specifying whether they were dealing with the defendant's right under Article 2, Section 10 of the Constitution of the State of Arkansas or the Fourteenth Amendment to the Constitution of the United States. The Court clearly contemplated the issue of the difference between the constitutionality of the order itself and the constitutionality of the subsequent application of the order at the trial when it made the following statement in its opinion:

> "The trial court was faced with a difficult situation at best when presented with a witness who had been hypnotized and the damage done before any ruling could be made. We think the trial court took the proper course in its ruling and any prejudice or deprivation caused the appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court. We can find no violation of her constitutional rights." (Appendix to Petition, p. xiv)

Whether petitioner argued the issue well at the Arkansas Supreme Court or not, the Court obviously understood the argument and ruled on it. Where the state has ruled on the issue the issue is reviewable by certiorari before this Court. *Franks v. Delaware,* 438 U.S. 154, 57 L. Ed. 2d 667 (1978); *Ulster County Court v. Allen,* 442 U.S. 140 (1979).

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed and a new trial granted for Petitioner.

Respectfully submitted,

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